Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company, and	)	CC Docket 00-65
Southwestern Bell Communications Services,	)	
Inc. d/b/a Southwestern Bell Long Distance	)	
for Provision of In-Region, InterLATA	)	
Services in Texas	)	

Second Application by SBC Communications
For Authorization to Provide In-Region InterLATA Services
In Texas

REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

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REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

The Competition Policy Institute[1] ("CPI") respectfully submits these reply comments on the second application of SBC Communications, Inc. et al ("SBC" or "SWBT") for authority pursuant to 47 U.S.C. 271, to provide in-region, interLATA services in Texas.

I. INTRODUCTION AND SUMMARY

In our comments on SBC's second Texas application ("Texas II"), we argued that SBC's application was, like its first, premature and that simply refiling the same evidence in a new docket did not improve the substance of the evidence.

Comments filed by other parties, especially those of the Department of Justice ("DOJ"), highlight that the evidence in the record is substantially the same as the day SBC filed its first application. Accordingly, the DOJ noted the Commission's preference that parties not reiterate previously filed comments and abstained from offering another negative evaluation of SBC's inadequate second application.[2] The DOJ observed that SBC had "augmented the record" of its pending application five days prior to the deadline for filing initial comments and nearly halfway through the DOJ's evaluation period.[3] Moreover, the DOJ expects SBC to provide similar data for April, several days after the filing deadline for these reply comments.[4] Rather than base its evaluation on an incomplete record, with little time to properly evaluate the evidence, DOJ states that: "In the event that the Commission decides to rely on these post-application submissions in

1 CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. Complete information about CPI can be obtained from our website at <www.cpi.org.>.

2 *See* DOJ Eval. p. 3.

3 *Id*.

4 *Id*.

making its determination on this application, [DOJ] believe[s] it would be helpful for the Department's recommendation to be based on an analysis of all these data."[5]

CPI agrees with the DOJ on the status of the evidence. We disagree, however, with the DOJ's assumption that the Commission may rely on SBC's post application submissions to reach its decision. The Commission's rules on this point are clear and there is no compelling reason to waive those rules. When the Commission established the filing rules for BOC §271 applications, it anticipated that the application process could get mired in a procedural swamp of repeated amendments, bogging down the Commission's review process and compromising the ability of interested parties to comment on a clear record.[6] To prevent such occurrences, the Commission established the principle that "a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon."[7] The Commission found that such a rule "ensures that commenters are not faced with a "moving target" in the BOC's section 271 application."[8]

CPI acknowledges that this rule is discretionary.[9] In the *New York Order*, the Commission declined to strike certain filings that post-dated Bell Atlantic's application.[10] In explaining its decision to permit late-filed evidence, the Commission stated that it did not rely on evidence concerning events that occurred after the application was filed in reaching its decision.

5 *Id*. at 4.

6 *See Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Services in the State of New York*, CC Docket No. 99-295, *Memorandum Opinion and Order*, FCC 99-404 rel. Dec. 22, 1999, ¶ 35, *appeal pending sub. nom., AT&T v. FCC,* Case No. 99-1538 (D.C. Cir.)("*New York Order*").

7 *Id.* ¶ 34; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket 97-137, *Memorandum Opinion and Order* FCC 97-298, at ¶ 49-50 (1997) ("*Ameritech Michigan Order*").

8 *New York Order* ¶ 35.

9 *Id.*

10 *Id.* at ¶ 38.

However, the posture of the instant application is different than Bell Atlantic's New York application. As of April 5, 2000, when SBC filed its second application, the company could not show that it had complied with the requirements of §271 to warrant in-region, interLATA authority. The only way SBC can conceivably obtain such authority now is to improve its performance and provide the Commission with proof of that improved performance. This means that the Commission, at a minimum, must analyze the March and April data before granting SBC's application. Since the Commission cannot consider April data under its current rules, and since other parties will not be able to comment on such new evidence, we recommend that SBC be required to refile its application when it can provide the Commission with April data. If SBC chooses not to take that step, the Commission should reject SBC's application.

In case the Commission does not require SBC to refile, we offer these reply comments based on the evidence in SBC's pending application. In brief, we find that SBC fails to show compliance with either the checklist or the requirements of the public interest test. We limit our analysis of checklist issues to SBC's record on providing coordinated conversions of active customers from SBC to CLECs. In particular, our comments focus on SBC's inability to effect these conversions without regularly disrupting the customer's service. This issue is critical because unexpected and prolonged service outages have a chilling effect on competition.

With respect to the Commission's required public interest analysis, CPI believes that evidence in the record indicates that "other relevant factors exist that would frustrate the congressional intent that markets be open."[11] First, we think the Commission should find that SBC's planned rollout of Project Pronto will likely frustrate the development of both data and voice competition in the future, eventually undermining any finding that SBC's Texas market is

[11] *Id.* at ¶ 423.

"open to competition."[12] The rollout of Project Pronto, a $6 billion program to bring fiber closer to SBC's customers using Digital Loop Carrier ("DLC"), presents tremendous opportunities. But while it affords an opportunity for more consumers in SBC's region to obtain DSL service, it also presents SBC with the opportunity to build a network that is effectively closed to its wholesale customers and competitors. Clearly, a network with these characteristics will not serve the purposes of the Communications Act, or be consistent with the "public interest convenience and necessity." We conclude that the Commission should not grant SBC's application until the company provides the Commission with a detailed description of how Project Pronto will comply with the pro-competitive provisions of the Act and the Commission's rules.

Second, SBC's policies in the DSL marketplace frustrate competition for both voice service and advanced services. We agree with those parties who report that SBC's policies on DSL simultaneously protect SBC's near-monopoly in voice service[13], establish SBC's dominance in the advanced services market[14], and prevent competitors from offering bundled voice and advanced services that compete with SBC's similar offerings.[15]

II. SBC'S HOT CUT LOOP PERFORMANCE FAILS TO COMPLY WITH CHECKLIST REQUIREMENT FOR UNBUNDLED LOOPS

In our initial comments on SBC's Texas II application, we argued that the supplemental data filed by SBC on April 5 offered no evidence that the company's hot cut performance had

12 *See Id.*
13 *See* AT&T Comments p. 17.
14 *See* Northpoint Comments p. 7.
15 *See* ALTS Comments p. 10.

improved since it filed its first application in January. The CLECs' experience in Texas, as reported in their comments, confirms this view.

To obtain §271 approval, SBC must show that it is fulfilling a concrete and specific legal obligation to furnish nondiscriminatory access to unbundled loops.[16] In practice, CLECs obtain loops from SBC in three ways. First, they may order stand-alone new loops from SBC. Second, CLECs can obtain loops through purchase of the UNE-Platform ("UNE-P"), which includes the loop, combined with switching and transport elements. Third, CLECs may order coordinated conversions ("hot cuts") of existing customers from SBC to a CLEC. We focus our comments on this third form of unbundled loop provisioning because, as the Commission recognizes, the manual process inherent in the hot cut process creates the substantial risk that a customer switching from SBC to the CLEC will lose service for an extended period of time.[17] Such outages can have a severe impact on a competitor's ability to acquire and retain customers. Because defective hot cuts pose such a threat to competitors and competition, CPI believes the Commission should adhere to the standards established in the *New York Order*, even though competitors use the UNE platform more frequently.[18]

The governing standard for evaluating whether SBC's hot cut process complies with §271 is whether the company meets its obligation to provide hot cut loops in the quantities that competitors require, at an acceptable level of quality, and with minimum service disruption allowing competitors a meaningful opportunity to compete.[19] There is no doubt that a CLEC's inability to switch a customer from the incumbent without unexpected service outages can have a

[16] *See* 47 U.S.C. § 271(C)(2)(B)(iv); *Ameritech Michigan Order* ¶ 110.
[17] *See New York Order* ¶ 309.
[18] *See Ex Parte* Letter from SBC Communications to Magalie Roman Salas, CC Docket 00-4, filed April 5, 2000 at p. 9 (approx. 10-15% of SBC's Texas unbundled loops are hot cuts)(" SBC Refiling Letter").
[19] *See New York Order* ¶ 291.

far-reaching impact on the CLEC's prospects for acquiring and keeping customers. As RCN states:

> It does not take many botched orders to tarnish the reputation of a competitor. The end user will not care whose fault it is, but will instead think that sticking with the incumbent would provide the least disruption. Thus, all the marketing and production development efforts of the CLEC will be held hostage to the BOC's performance of the hot cut.[20]

On review of SBC's hot cut evidence and other comments on that evidence, CPI concludes that SBC's application fails to show that its hot cut performance afford CLECs a meaningful opportunity to compete. First, SBC's service quality measures for hot cuts are insufficient, particularly with respect to outages. Second, SBC's data is flawed and unreliable. Third, SBC's hot cut performance data, when reconciled, reveals discrimination.

A. SBC's Hot Cut Performance Measures are Insufficient

In the *New York Order*, the Commission reviewed performance data that measured installation troubles on lines provisioned through hot cuts[21] and adopted this measure as appropriate for capturing service outages due to hot cuts.[22] Although SBC is not obligated to have a direct measure for outages, it must have some measure that accurately captures whether it is "provisioning working, trouble-free loops,"[23] with a "minimum of service disruption, thereby affording competitors a meaningful opportunity to compete."[24]

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20 RCN Comments p. 11.
21 *New York Order* ¶ 300.
22 *Id.* at ¶ 301 n. 959.
23 *Id.* at ¶ 299.
24 *Id.* at ¶ 291.

The hot cut process is intrinsically a manual process that can easily lead to unexpected service outages resulting from premature disconnects of the loop, late cutovers and a variety of errors in the cutover procedure. SBC currently lacks any single measure or combination of measures that adequately measures captures outages due to failed hot cuts. SBC has only one performance measure, PM 114, which captures a fraction of these outages: premature disconnects.

In its comments, AT&T contends that the absence of a performance measure capturing outages due to defective hot cuts is the "most glaring defect in SWBT's current performance measures."[25] Equally damaging is the Texas PUC's admission that "the current performance measurements do not capture all outage data."[26] Recognizing this gap in SBC's performance measures, the Texas PUC, SBC and CLECs have developed, but have not yet implemented, a new performance measure that should capture "the outages that result from defective loops."[27]

Even when SBC captures the important outage information in its performance measures, the data are presented in a way that makes comparison with existing standards difficult. As the DOJ noted in its evaluation of SBC's first Texas application, SBC reports its Texas performance data on a "per loop" basis while the controlling standard in the *New York Order* is expressed in terms of entire loop orders.[28] The DOJ finds that SBC's reporting method tends to overstate its performance, compared to Bell Atlantic's minimally sufficient performance of outages on five percent of hot cut *orders*.[29] We agree with DOJ's observation. An apples-to-apples comparison requires that the Texas data be stated on the same basis as the New York data.

25 AT&T DeYoung/Van De Water Supp. Decl. ¶ 96.
26 Texas PUC Eval. p. 17.
27 *Id*.
28 DOJ Eval. CC Docket 00-4, p. 6 (filed Feb 14, 2000).
29 *See New York Order* ¶ 309.

CPI also believes that a per-order standard provides a better frame of reference than the Texas PUC's per-loop analysis.[30] To see why the per-order standard is more relevant, suppose a CLEC customer switches five lines and that one of those lines goes out of service for an extended period during the cutover. CPI doubts that the customer will appreciate that the CLEC provided four working lines. Instead, we suspect the customer will perceive that the service order resulted in an extended service outage.

Now suppose a CLEC provides ten customers with service of five lines each and three of these customers experience an outage on one line. SBC's per-loop reporting method would reflect that 6% (3/50) of the loops experienced outages, while the Commission's and DOJ's per-order method would reflect a 30% outage rate among the orders. Since each customer that experienced an outage would likely be dissatisfied with the CLEC's performance, we cannot agree that reporting data on a per-loop basis accurately depicts the impact of faulty loop provisioning in this example. In any event, if the Texas data is to be compared to the New York performance standard, it must be stated on a "per-order" basis.

B. SBC's Data is Flawed and Unreliable

It is axiomatic that accurate data is needed to gauge SBC's performance in opening its market to competition.[31] There are two impediments to the data in this case being accurate and trustworthy. First, as discussed above, SBC's current performance measures do not report data on those aspects of its performance that are most relevant to the determination the Commission must make in this proceeding. Second, even where the collected data are relevant, CLECs report that SBC makes errors in its data gathering and reporting. These impediments lead CPI to agree

30 *See* Texas PUC Eval. p. 13.
31 AT&T Comments p. 38.

with many CLECs that SBC is not yet "able to accurately and reliably provide data" for its specific performance measurements.[32]

CLECs contend that, even at this late stage in the §271 application process, "there are still lingering doubts as to the veracity of the SBC performance data."[33] NEXTLINK, for example, argues that SBC "failed to capture a significant amount of NEXTLINK's outages."[34] Allegiance also comments that there are often discrepancies between its data and SBC's data.[35]

SBC's failure to gather and report data accurately means that CLECs must devote substantial time reconciling data with SBC personnel. This reconciliation requires that SBC, CLECs and regulators sift through raw data order by order. CLECs report that the reconciliation process is "extraordinarily resource intensive."[36] Further, SBC is often unwilling to reconcile disputed data with CLECs unless the Texas PUC directs such reconciliation.[37] The upshot is that SBC is unable to provide reliable, accurate data. We also agree that the company's refusal to reconcile disputed data is "incompatible with the demands of a competitive market."[38]

Given the doubts about the accuracy and reliability of SBC's own data, we suspect that the most reliable evidence on SBC's hot cut performance comes from the data that SBC and AT&T reconciled. Although SBC's supplemental affidavits refer to this process, SBC and AT&T did not complete the reconciliation and submit the data to the Texas PUC until April 21, 16 days after SBC filed its second application for §271 authority in Texas.

32 ALTS Comments p. 4.
33 RCN Comments p. 9.
34 ALTS Comments p. 3.
35 Allegiance Comments p. 9.
36 AT&T DeYoung/Van de Water supp decl. ¶ 77.
37 ALTS Comments p. 5, n. 16.
38 AT&T Comments p. 38.

C. SBC's Reconciled Performance Data Reveals Discrimination in Hot Cut Provisioning

The reconciled data does not support SBC's claim its hot cut loop performance complies with the checklist, at least not if the New York standard for hot cuts is relevant. Instead, the reconciled data reveals that SBC continues to have problems completing hot cuts without debilitating service outages.

The reconciled data provided by AT&T and SBC reflects that 16.7% of AT&T's hot cut orders from December to February experienced outages.[39] When that data is separated into Coordinated Hot Cut ("CHC") performance and Frame Due Time ("FDT") performance, AT&T concedes that SBC's performance is better for hot cuts on CHC orders.[40] But this good news is muted because SBC "has encouraged, if not required, CLECs to switch from CHC to FDT for smaller volume loop cuts...because CHC is too resource intensive to support commercial levels of demand." [41] Moreover, CLECs contend that SBC charges a penalty if they use CHC.[42] In contrast, the Texas PUC contends SBC's "long term performance on the unbundled loop conversion process is more accurately represented by a review of CHC."[43] Given that SBC views the FDT process as the preferred method for hot cuts, CPI believes the Commission's focus, for purposes of determining whether SBC affords competitors a meaningful opportunity to compete, ought to be on the FDT data.

We think the Commission should also be concerned that SBC's performance worsened at exactly the same time SBC filed its first §271 application for Texas. AT&T reports that SBC's

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39 AT&T DeYoung/Van de Water Supp. Decl. ¶ 20-25.
40 *Id.* at ¶ 22.
41 DOJ Eval., CC Docket 00-4, p. 28.
42 AT&T DeYoung Decl., CC Dkt. 00-4, ¶44.
43 Texas PUC Eval. at p. 20.

outage rate for August, September and October 1999 was 8.2 percent, half the 16.7 percent outage rate for the period December 1999 through February 2000. Importantly, SBC's performance deteriorated as volumes increased and suffered when SBC most needed to perform in adequate fashion.

Despite SBC's performance failures evident in the reconciled data, the Texas PUC believes that SBC's performance for CHC cutovers is "within acceptable limits" for checklist compliance.[44] As discussed earlier, though, the Texas PUC's analysis of hot cuts considered data reported on a per-line basis and focused primarily on CHC data.[45] On the other hand, the AT&T/SBC reconciled data was stated on the basis of orders, making the comparison with the *New York Order*'s 5% standard a correct comparison.[46]

The Texas PUC concedes that SBC's performance on premature disconnects was out of compliance in February.[47] However, the Texas Commission accepts SBC's defense that it has rectified the software defect responsible for February's spike in premature disconnects, and instead relies on improvements it finds in SBC's preliminary March data.[48]

We stress that the Commission, the Texas PUC, and interested parties must have the opportunity to review complete and reconciled data from March and April. The Commission should not attempt to decide whether SBC's hot cut loop performance is adequate for checklist compliance based on preliminary data that the parties have not reconciled. In any event, data on premature disconnects shows only a part of the picture of SBC's hot cut outage record. Until SBC can provide complete reconciled data on outages, this second application, like the first, is incomplete and should be rejected.

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44 *Id*. at 18.
45 *Id.*
46 AT&T DeYoung/Van de Water Supp. Decl. ¶ 19-21.
47 Texas PUC Eval. p. 18-19.
48 *Id*. p. 19.

III. SBC'S APPLICATION IS CONTRARY TO THE PUBLIC INTEREST

Even if the Commission accepts SBC's unsupported claim of checklist compliance, the Commission cannot grant the application unless SBC's entry into the in-region, interLATA market is found to be "consistent with the public interest, convenience and necessity."[49] The public interest inquiry required under §271 affords the Commission the "opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open."[50] One factor in this analysis evaluates whether there are unusual circumstances in the local market that would make SBC's entry into the long distance market contrary to the public interest.[51] In its *New York Order*, the Commission further examines whether the applicant provides "sufficient assurances that markets will remain open after grant of the application."[52] Although no single factor is dispositive, on balance the public interest inquiry affords the Commission the opportunity to "ensure that nothing undermines our conclusion...that markets are open to competition."[53]

We think SBC's application fails this public interest test because there are at least two special circumstances in SBC's local market that cast doubt on SBC's assurances that it will continue to keep its markets open following interLATA entry. First, SBC's Project Pronto network redesign, through which the company promises to bring high-speed services to more consumers, will likely stifle competition and innovation in the Texas market for both voice services and advanced services. Second, SBC's policies affecting sale of retail and wholesale

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49 47 U.S.C. § 271(d)(3)(C); *New York Order* ¶ 422.
50 *New York Order* ¶ 423.
51 *Id.*
52 *Id.*
53 *Id.*

DSL services frustrate competition in the DSL market, the voice market and the market for bundled voice and DSL service.

A. SBC's Project Pronto Network Redesign Will Frustrate Local Competition in Texas

In our comments on SBC's second application, we argued that SBC must provide the Commission with specific assurances that its Project Pronto architecture will not limit CLECs' opportunity to compete in the market for voice services, data services or combinations of these services. CPI and many CLECs expressed concern that SBC's rollout of Project Pronto may result in a rollback of the progress of local telecommunications competition in Texas.

The Commission's rules already provide the framework that SBC should follow for its deployment of Project Pronto. The *UNE Remand Order* obligates ILECs to allow CLECs to collocate equipment at remote terminals ("RTs") in Digital Loop Carrier systems.[54] The rules specify that incumbents must provide nondiscriminatory access to the feeder distribution interface,[55] whether housed in a multi-dwelling unit, a remote terminal, or a controlled environment vault.[56]

Thus, the Commission's rules provide a basis on which CLECs can obtain the facilities they need to provide the services they seek to offer. Importantly, the Commission's rules

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[54] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order, Fourth Further Notice of Proposed Rulemaking*, FCC 99-238 ("*UNE Remand Order*") ¶ 206; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, rel. Aug. 8, 1996, ¶ 570, aff'd in part and vacated in part sub nom *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils Bd.*, 119 S. Ct. 721 (1999)("*Local Competition Order*").

[55] The point in the ILECs outside plant that connects the lines from subscribers (distribution plant) to the lines that lead to the central office (feeder plant). *See UNE Remand Order* ¶ 206.

[56] 47 USC § 51.319(a)(2); *UNE Remand Order* ¶ 206, 218, 221.

recognize CLECs' right to acquire the full functionality of the loop to provide services and innovation in competition with the incumbent. As Northpoint suggests, this is the very essence of competition.[57] SBC's Project Pronto network, however, "will only allow CLECs to purchase a data-only loop or a line shared sub-loop shared with SBC POTS."[58]

The CLECs' wariness about Project Pronto is clearly justified. To provide competitive DSL service, CLECs need non-discriminatory access to Project Pronto-enabled loops.[59] CLECs also need the ability to provide high speed data services other than ADSL services.[60] Some CLECs also want to provide integrated voice and DSL over the Project Pronto network.[61] In total, competitors wish to offer an array of potential solutions that will allow them a "meaningful opportunity to compete." CLECs also indicate they are willing to work with SBC to find competitively neutral solutions so that Project Pronto does not "turn back the clock on provision of competitive DSL services in Texas."[62]

SBC replies that the CLECs' proposals are unworkable. For instance, SBC suggests that collocation in RT cabinets is not feasible because Alcatel, its supplier, designs the cabinets with no space to house competitors' collocated equipment.[63] SBC further argues that, even if larger RT cabinets were available, local zoning restrictions and construction expenses make them cost prohibitive.[64] Of course, SBC recognizes that CLECs cannot build adjacent RTs to interconnect

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57 *See* Rhythms Comments p. 12.

58 CompTel Comments p. 6-7.

59 @Link Networks, Bluestar Network Services, DSLNet, MGC Communications, Pontio Communications, Joint Comments p. 21 ("@Link Joint Comments").

60 *Id.* at 22.

61 CompTel Comments p. 6.

62 @link Joint Comments p. 22.

63 *See* Letter from Paul K. Mancini, SBC to Lawrence E. Strickling, Chief, Common Carrier Bureau, SBC, *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control,* CC Docket 98-141, filed Feb. 15, 2000, at 2. ("*SBC-Ameritech Merger Conditions Proceeding*") ("SBC Project Pronto Letter").

64 *See Id.*

with SBC's cabinets because the same zoning restrictions would impede those efforts.[65] Moreover, the construction expense for CLECs would preclude entry, given the limited number of customers they could expect to reach with their investment.[66]

CPI suggests the Commission not accept SBC's arguments at face value. As the Commission noted, SBC and other ILECs "raised similar doubts as to whether collocation would be feasible at central offices."[67]

SBC also dismisses suggestions that CLECs obtain third party line cards that plug into slots within the RT cabinet. While this solution may have some appeal, there is considerable doubt whether this is technically feasible, given the nature of DLC equipment and the software that allows them to function. CPI was encouraged, however, that the Common Carrier Bureau's Public Forum on Competitive Access to Remote Terminals produced some ideas that may be acceptable to both CLECs and SBC. One suggestion involves providing CLECs a Permanent Virtual Circuit that would allow them to choose the service provided to the customer without requiring expensive collocation. In addition, Alcatel indicates that it intends to develop line cards for other forms of ADSL.

Perhaps the most troubling and revealing aspect of Project Pronto is SBC's failure to consider the implications its network redesign would have on its wholesale customers. The volume of exhibits filed on this issue, both in this proceeding and in the *SBC-Ameritech Merger Order*, clearly shows that SBC never considered how it would continue to serve CLECs using the new architecture.

For example, the transcript of the March 1, 2000 Project Pronto overview meeting between SBC and CLECs provides insight into SBC's planning and implementation process.

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65 *See Id.*
66 *See e.g.,* CompTel Comments p. 7.
67 *UNE Remand Order* ¶ 221.

When CLECs pressed SBC to explain how a CLEC could provide integrated voice and data over a Project pronto loop, Mr. Rod Cruz, SBC's Director Broadband-UNE, responded: "I don't think that's something we've contemplated, so I think we'll have to go back to the drawing board and address that."[68] In response to a question whether SBC solicited input from CLECs in choosing Project Pronto technology, SBC answered simply: "No."[69]

Fundamentally, this demonstrates that SBC still operates with a monopoly market mentality. We doubt whether a company operating in a competitive market would redesign its network without considering the needs of its wholesale customers.

There is no obvious short-term solution to this problem. The Commission must make it clear to SBC that it must accommodate the CLECs' needs when planning its network redesign. Any such plans must allow CLECs to choose the service and technology to provide innovative new services distinguished from SBC's. Until such plans are finalized, there is substantial doubt whether SBC's Texas market would remain open to competition. For this reason, CPI believes the Commission should find that the application fails the public interest standard used in the *New York Order*.

B. SBC's Policies Frustrate Competition For DSL Services in Texas

In our prior comments, CPI argued that SBC's policies prevent competitors from effectively competing in the bundled voice and DSL service market. We highlighted SBC's refusal to permit CLECs to obtain the high frequency portion of UNE-P loops when the CLEC provides voice service using this platform. CPI focused on the issue because UNE-P will

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[68] Project Pronto Overview Transcript p 50, Attachment 1 to DSL Access Telecommunication Alliance Reply Comments, *SBC-Ameritech Merger Conditions Proceeding*, CC Docket 98-141, filed March 10, 2000.

[69] *Id.* at p. 91.

evidently be the preferred choice for competitors that mass-market local telecommunications services in Texas.[70] We further noted SBC's admission that it will not provide DSL service to a customer that obtains voice service from a CLEC.[71] These policies, combined with SBC's emerging dominance in the residential DSL market, potentially undermine competition in the voice market. Comments in this proceeding support our view and show that SBC continues to strengthen its grip on the residential DSL market by favoring its data affiliate and discriminating against CLECs that purchase unbundled loops for DSL.

1. SBC Policies Frustrate Competitors' Ability to Market Bundled Voice and DSL Service in Competition with SBC.

SBC claims that the Commission's *Line Sharing Order*[72] specifically exempts UNE-P arrangements from line sharing requirements.[73] We strongly dispute this interpretation. Instead, CPI agrees with AT&T that a carrier's request to access the high frequency portion of the loop ("HFPL") when it has purchased the loop as part of the platform is not line sharing at all.[74] Rather, the Commission's *Line Sharing Order* simply refers to a CLEC acquiring the HFPL UNE to share the line with the ILEC's voice service.

With UNE-P, the CLEC purchases the whole loop, in addition to the transport and switching elements that makeup the platform. Under the Commission's rules implementing the 1996 Act, when a competitor purchases an unbundled loop, the competitor is entitled to receive

[70] *See UNE Remand Order* ¶ 273, n. 543.
[71] *See* AT&T Pfau/Chambers Decl, CC Docket 00-4, ¶ 29.
[72] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, *Third Report and Order*, FCC 99-355, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, *Fourth Report and Order*, (rel. Dec. 9, 1999) ("*Line Sharing Order*").
[73] SBC Cruz Supp. Aff. ¶6, (citing *Line Sharing Order* ¶ 72.)
[74] AT&T Comments p. 15.

the "full capability of the loop".[75] CPI believes that a competitor purchasing a loop combined with transport and switching is still entitled to "the full capability of the loop". It is hard to believe that the Commission would craft rules that deny CLECs access to the HFPL when it obtains the loop as part of the platform, yet permit the CLEC to acquire the HFPL when the ILEC is using the loop for voice.

Accordingly, we recommend that the Commission clarify for SBC and future §271 applicants that they must provide nondiscriminatory access to the operational support necessary for CLECs to provide both DSL and voice services over UNE-P loops. To do otherwise will condemn consumers to limited choices for each of voice and data services and no choice for combined voice and data service.

2. SBC Uses its Near Term Advantage in the Residential DSL Market To Constrain Consumer Choice of Voice Service

SBC's refusal to permit CLECs to provide voice and DSL on a single UNE-P loop and its refusal to provide DSL service to CLEC voice customers would be less detrimental if it weren't for the dominant position SBC has in the Texas DSL market. As a practical matter, for many consumers, SBC is often the only choice for DSL. Unfortunately for these consumers, it is unlikely the situation will change anytime soon. Commenters indicate that, in addition to refusing to allow CLECs to bundle DSL with UNE-P voice service, SBC impedes DSL competition by denying line sharing to CLECs, and inadequately providing access to second loops for DSL.[76] If the Commission allows these polices to stand, SBC can use its advantage in DSL to thwart competition in the voice market.

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[75] 47 CFR § 51.307.

[76] *See* AT&T comments p. 4.

SBC possesses an advantage in the Texas DSL market largely because it discriminates against its competitors. While SBC's data affiliate ("ASI") can provide DSL over the same working phone lines consumers use for voice, CLECs must order a second loop. As SBC admits, "CLECs cannot be guaranteed of using an existing, already-tested and trouble-free loop."[77] SBC thus concedes that it provides its affiliate access to loops of superior quality than it provides to competitors. This is not nondiscriminatory access to unbundled loops.

SBC contends that such discrimination is "consistent with all regulatory requirements."[78] For instance, SBC claims the SBC-Ameritech merger conditions temporarily redress this discrimination and thus this discrimination is "permitted by the SBC/Ameritech Merger Conditions."[79] Under the merger conditions, SBC must give CLECs a 50% discount on the cost of a new loop it provisions to provide DSL to a customer.[80] Yet, even with this discount in place, SBC's data affiliate still obtains preferential treatment. First, the second loop discount does not offset the fact that it costs ASI nothing to share a loop. Second, SBC's interim discount is discriminatory since it does not account for the operational costs CLECs incur when provisioning second loops from SBC.[81] SBC recognizes this inherent discrimination and suggests it will disappear once it implements the *Line Sharing Order* in Texas.[82]

SBC also claims that ASI's advantage in access to line shared loops is not an unfair advantage and thus does not violate the nondiscrimination requirements of § 271. The

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77 *Id*. at ¶ 8.

78 SBC Chapman/ Dysart Supp. Aff ¶ 8.

79 SBC Refiling letter p. 15. CPI believes the merger conditions are clearly irrelevant for purposes of § 271. The Merger Order specifically states that conditions did not reflect "the criteria for BOC entry in to the interLATA services market." SBC-Ameritech Merger Conditions Order ¶ 357.

80 SBC Chapman/Dysart Supp. Aff. ¶ 9.

81 *See Id.* at ¶ 8-9, 36-37.

82 SBC Chapman/Dysart Supp. Aff. ¶ 36.

Commission should reject this argument. The Commission should not sanction SBC's discrimination against data CLECs.

Several commenters suggest ways SBC could alleviate discriminatory practices in the implementation of line sharing. First, SBC could make interim line sharing available to CLECs on the same terms and conditions available to ASI. However, SBC refuses to make interim line sharing available on any terms.[83] Second, SBC could deny line sharing to all CLECs, including ASI, while it prepares to implement line sharing throughout Texas. Either of these two paths would allow SBC to comply with the non-discrimination requirements of §271 now.[84] Since §271 requires SBC to provide evidence of nondiscriminatory access to network elements, including unbundled loops for xDSL, SBC's admission that its practices are discriminatory should doom this application.

Although SBC contends ASI's advantage will dissipate once line sharing is available, the Commission should doubt SBC's paper promise that it will implement the *Line Sharing Order* by the June 6, 2000 deadline.[85] Comments from CLECs indicate it is "very unlikely that wholesale (or even substantial or partial) implementation of line sharing .... will be available in Texas by the Commission's June 6, 2000 deadline."[86]

It appears that SBC is using the same approach to line sharing that the company took toward implementation of nondiscriminatory access to loops and OSS for xDSL.[87] Consistent

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83 *See* Northpoint Comments p. 8; Rhythms Comments p. 7-8.

84 Alternatively, SBC could withdraw its application and refile once it provides line sharing on a nondiscriminatory basis.

85 *See* SBC Cruz Supp. Aff. ¶ 17.

86 Rhythms Comments p. 7.

87 *See e.g.*, Arbitration Award, *Petition of Rhythms Links for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Dkt. No. 20226, *and Petition of DIECA Communications Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Arrangements with Southwestern Bell Telephone Company*, Dkt. No. 20272, at p. 48 (Tex P.U.C. November 30, 1999)

with its posture on DSL competition, SBC is unwilling to negotiate the terms of line sharing with CLECs.[88] According to Northpoint, SBC requires CLECs to accept a "unilateral, one-sided (and roundly unacceptable) contract proposal or delay their market entry until arbitration is complete...as much as four or five months."[89] Rhythms also reports similar experiences in negotiations with SBC and points out that nearly four months elapsed between its initial request to negotiate with SBC and the parties' first meeting.[90]

Comments in this proceeding suggest a pattern of strategic delay. By erecting multiple roadblocks, SBC can cement its dominant position in the DSL market, which it then may use to thwart competition to its voice services. We think the Commission should be very concerned about such anti-competitive behavior: it raises substantial doubts whether SBC has a genuine commitment to keeping its markets open to competition in the future. In turn, these doubts fatally damage any assumption that SBC's application for §271 approval meets the public interest standard as articulated in the Commission's *New York Order*.

88 Rhythms Lopez Aff. ¶ 4-7.
89 Northpoint Comments p. 8
90 Rhythms Comments p. 7.

IV. CONCLUSION

For the foregoing reasons, CPI respectfully recommends the Commission deny SBC's second application for authority to provide in-region, interLATA services in Texas. The denial of this application should be accompanied by certain guidance to SBC concerning a future application. First, the Commission should issue clear instructions that SBC must provide complete evidence of its compliance with the 14-point checklist at the time a new application is filed: supplemental evidence will not be considered. Second, the Commission should require SBC to explain how it will implement Project Pronto in a manner that is consistent with its obligations under the Act and the Commission's rules. Third, SBC should be instructed to permit CLECs to use the full functionality of UNE-P loops, including providing DSL over those loops.

Respectfully submitted,

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May 19, 2000

CERTIFICATE OF SERVICE

I, Christina Devlin, hereby certify that on this 19th day of May 2000 copies of the foregoing Reply Comments of the Competition Policy Institute were served by electronic filing or by first-class, United States mail, postage prepaid, upon each of the parties listed below.

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